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The Hon. Alison J. Nathan
United States District Court Judge
Southern District of New York
40 Foley Square
New York, NY 10007

Re: *United States v. Ghislaine Maxwell*, 20 Cr. 330 (AJN)
Joint Letter re. defense witness disclosures, Dkt. No. 250

Dear Judge Nathan:

Pursuant to your order of April 26, 2021, Dkt. No. 250, the respective positions of the parties regarding the timing of any defense Fed. R. Crim. P. 26.2 disclosures are set forth below.

**Ms. Maxwell's Position**

Ms. Maxwell does not agree with the government's proposal that she submit witness statements pursuant to Federal Rule of Criminal Procedure 26.2 at least four weeks in advance of trial. No statute or rule requires disclosure of *either* non-expert witness lists or Rule 26.2 material in advance of trial. Furthermore, the defense has not been given any specific dates related to any alleged illegal activity nor has the government disclosed the actual identity of any alleged victim or witness. Accordingly, it is impossible to identify any affirmative witness who might, for example, place Ms. Maxwell in a different location at a specific date and time. Until the government completes the presentation of its evidence at trial, the defendant will not be able to identify definitively witnesses that may be relevant or necessary. A court order for pretrial

disclosure of merely prospective witnesses would infringe upon Ms. Maxwell's Fifth and Sixth Amendment rights because it would force Ms. Maxwell to reveal potential defense strategies.

However, in the spirit of cooperation and to avoid any unnecessary trial delay, the defense proposes that to the extent there are any non-public Rule 26.2 witness statements in the defense possession (not already in the possession of the government) such statements be produced to the government after (1) the government closes its evidence and (2) the conclusion of the argument on the first defense Rule 29(a) motion.[1]

## I. Rule 26.2 Does Not Mandate Advance Disclosure of Statements of Prospective Defense Witnesses.

Rule 26.2(a) provides:

> After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

Fed. R. Crim. P. 26.2(a). The requirements of Rule 26.2 "essentially track those of the Jencks Act." *United States v. Scotti*, 47 F.3d 1237, 1249 (2d Cir. 1995). The Rule provides that the defense, like the prosecution, must produce witness statements. *See* Fed. R. Crim. P.

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[1] Ms. Maxwell understands that the Court has ordered that "The Defendant's Rule 16(b)(1)(A) and 16(b)(1)(B) disclosures and witness list are due three weeks before the trial commencement date." *See* Dkt. No. 250. Fed. R. Crim. P. 16(b)(1)(A) applies to documents and objects that the defendant intends to use in the defendant's case-in-chief at trial. Fed. R. Crim. P. 16(b)(1)(B) applies to reports of examinations or tests and witnesses who prepared any report or examination if the defense intends to call the witness at trial during the defendant's case-in-chief. At this stage of the proceeding Ms. Maxwell continues to review the evidence and witness materials recently provided by the government and has not identified any documents, tests, or witnesses that would fall into these categories.

26.2(f) Advisory Committee's Note, 1979 Addition. However, like the Jencks Act, the Rule requires disclosure of witness statements only *after* a witness has testified on direct examination. Fed. R. Crim. P. 26.2(a); *see also Scotti*, 47 F.3d at 1250 ("The plain language of both Rule 26.2 and 18 U.S.C. § 3500(a) shows that the discovery procedure therein outlined applies only to statements that must be produced after a witness testifies[.]") (internal quotation omitted)); *United States v. Felt*, 502 F. Supp. 71, 74 (D.D.C. 1980) ("access is to be permitted after the defense witness has testified on direct examination"). A district court therefore lacks authority to order early disclosure statements of prospective defense witnesses.

Due to their similarities, federal courts look to decisions interpreting 18 U.S.C. § 3500 in order to interpret Rule 26.2. The Second Circuit has long maintained that "the Jencks Act prohibits a District Court from ordering the pretrial disclosure of witness statements." *United States v. Coppa*, 267 F.3d 132, 145 (2d Cir. 2001). *See also In re U.S.*, 834 F.2d 283, 286 (2d Cir. 1987); *United States v. Percevault*, 490 F.2d 126, 132 (2d Cir. 1974) ("the trial judge is prevented by the Jencks Act from ordering pretrial disclosure of statements made by a prospective government witness over the government's objection"). *Cf. United States v. Benson*, 20 F.R.D. 602, 605 (S.D.N.Y. 1957) (holding that *Jencks v. United States*, 353 U.S. 657 (1953) does not apply until "a witness is called to the witness stand").

Because the court cannot compel the government to provide early Jencks Act or Rule 26.2 disclosures to the defense – and the defense is not entitled to it by virtue of statute – it necessarily follows that the court cannot compel the same material from the defense. *See Wardius v. Oregon*, 412 U.S. 470, 475–76 (1973). A district court can only "encourage" the practice of early disclosure. *See Percevault*, 490 F.2d at 132.

## II. The Defense Does Not – and Need Not - Yet Intend to Call Any Particular Witness.

Unlike Rule 16(b)(1), the Jencks Act and Rule 26.2 do not obligate the defense to reciprocate the government's early disclosures with early disclosures of its own. If the government discloses Jencks Act material early, the defense is not obligated to act in kind. *See United States v. Martin*, No. CR 07-1205 (A) CBM, 2009 WL 453195, at *2 (C.D. Cal. Feb. 20, 2009) (denying government's motion to compel reciprocal Jencks Act discovery from defense). There is good reason for not mandating such reciprocity: the government and the defendant are not similarly situated.

Ms. Maxwell has the right to a presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The burden to prove guilt is high, and it is entirely the government's to bear. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In result, the defense is not obligated in any way to put on evidence at trial, including witnesses. Nevertheless, Ms. Maxwell has rights to a present a defense and to compulsory process of witnesses. U.S. CONST. amend. VI; *Washington v. Texas*, 388 U.S. 14, 18 (1967).

Because all defense witnesses are prospective, defense considerations regarding trial strategy with respect to these decisions are protected by attorney-client privilege and the work product doctrine. "Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." *United States v. Nobles*, 422 U.S. 225, 238 (1975). *See also Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("Government violates the right to effective

assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”).

If the court were to act outside its statutory authority and compel defense counsel to disclose defense material prematurely, then Ms. Maxwell’s Fifth and Sixth Amendment rights would be endangered. While the aims of judicial economy and efficiency may be served by ordering the defense to disclose prospective witnesses, such policy goals, however laudable, cannot trump fundamental liberties. “In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.” *Estelle*, 425 U.S. at 503.

## III. Procedural Rules Aside, the Government Must Timely Disclose Any *Brady* and *Giglio* Material.

*Brady* and its progeny impose upon the government broad duties of disclosure. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment”); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (defining materiality); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (same); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (government has duty to disclose material affecting reliability of government witnesses).

The court’s authority, or lack thereof, to order disclosures under Rules 16 and 26.2 does not affect the defendant’s right to *Brady* material. “It is, of course, a fundamental axiom of American law, rooted in our history as a people and requiring no citations to authority, that the requirements of the Constitution prevail over a statute in the event of a conflict.” *Coppa*, 267

F.3d at 145–46. Nor do the procedural and statutory rules affect the defense's right to *Brady* information prior to trial. *See* Docket No. 68 ("The Government shall disclose [*Brady*] information to the defense promptly after its existence becomes known to the Government so that the defense may make effective use of the information in the preparation of its case."); *accord* Fed. R. Crim. P. 5(f); *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) ("the Government must make disclosures in sufficient time that the defendant will have a reasonable opportunity to act upon the information efficaciously").

In sum, Ms. Maxwell will be able to identify any relevant defense witnesses and exhibits that she may need to introduce in a defense case only after the government concludes the presentation of its evidence at trial. Evidence may, or may not, be necessary after the government concludes its case-in-chief. Ms. Maxwell's proposal is reasonable and will avoid any unnecessary trial delays because it is unlikely that any Rule 26.2 statements not already in the possession of the government, if they exist, will be voluminous or complicated.

**<u>Government's Position</u>**

Consistent with the position set forth in its April 21, 2021 letter to the Court, the Government proposes that defense counsel provide a proposed witness list and witness statements pursuant to Federal Rule of Criminal Procedure 26.1 four weeks in advance of trial. Such a production schedule would be consistent with the Government's agreement to provide Jencks Act material seven weeks in advance of trial, which is significantly before the Government is obligated to produce such material under the relevant statute. Production in advance of trial will also ensure adequate time for the Government to file any relevant motions and to prepare any rebuttal case as appropriate. The defense proposal to delay production of

these materials until after the Government has rested allows no time for the Government to prepare any rebuttal case or to raise any relevant motions. The defense proposal also runs contrary to the Court's setting of a schedule that allows the parties to resolve any disputes in advance of trial.

Respectfully submitted,

Jeffrey S. Pagliuca

CC: Counsel of Record